82-1984

No. _____

In the

Supreme Court of the United States

October Term, 1982

Charles Smith ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

JOHN W. ACHOR
The John Haskins Law Firm
1690 Union National Plaza
Little Rock, Ark. 72201
501/372-2224

Attorney for Petitioner

QUESTION PRESENTED

Whether a Defendant's Fourth and Fifth Amendment rights are violated by a state trial court's holding that a defendant, if he chooses to testify in a pre-trial evidentiary suppression hearing, is open to cross-examination about all matters, and when limitation of cross-examination is also provided for by state rules as well.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner Charles Smith petitions for a Writ of Certiorari to review the affirmance, by the Supreme Court of Arkansas, for his conviction for possession of a controlled substance with intent to deliver.

OPINION BELOW

The original opinion of the Supreme Court of Arkansas, reproduced in the appendix, is reported as *Smith v. State*, 278 Ark. 462 (1983).

JURISDICTION

The decision of the Supreme Court of Arkansas, denying a timely petition for rehearing, was issued on April 4, 1983. This Court's jurisdiction is invoked in the 28 U.S.C. 1257(3), with Petitioner asserting a deprivation of rights secured by the Constitution of the United States.

STATEMENT OF THE CASE

On September 14, 1981, Petitioner was stopped while driving an automobile in Van Buren County, Arkansas. The law enforcement officer obtained access to the trunk of his vehicle and a substance, subsequently identified as marijuana, was seized. The following day a felony information was filed in the Circuit Court of Van Buren County.

A pre-trial hearing was held on November 25, 1981 on Petitioner's Motion to Suppress Evidence on grounds of seizure pursuant to an arrest without probable cause, without a warrant, and without a valid consent. The motion was denied. A jury trial was held on December 9, 1981. Petitioner was convicted of possession of a controlled substance with intent to deliver, and was assessed a sentence of six years in the Arkansas Department of Correction by the jury and fined $1,000.

A timely Notice of Appeal was filed. The appeal was eventually transferred from the place of its original docketing, the Arkansas Court of Appeals, to the Supreme Court of Arkansas under state appellate rules. By decision rendered February 28, 1983, the Supreme Court confirmed Petitioner's conviction. There was one dissent.

A timely Petition for Rehearing was filed and this petition was denied and the mandate issued on April 4, 1983. Trial and appellate counsel was relieved and current counsel substituted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fifth Amendment, United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

Rule 104(d), Arkansas Uniform Rules of Evidence:

> The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

REASONS FOR GRANTING THE WRIT

THE REFUSAL OF A TRIAL COURT TO LIMIT CROSS-EXAMINATION OF A DEFENDANT IN A PRE-TRIAL MOTION TO SUPPRESS EVIDENCE, IS VIOLATIVE OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS, BOTH PER SE AND IN VIOLATION OF DUE PROCESS BY CONTRAVENTION OF STATE PROCEDURE.

Petitioner was stopped and arrested while driving an automobile in Van Buren County, Arkansas. At a pre-trial hearing on the Motion to Suppress Evidence, Petitioner desired to present testimony with regard to the issue of consent, or lack thereof. The trial court held *in limine*, that cross-examination would not be limited to the issue under consideration and that "I feel like if you put him on, the State can ask him whatever they want to ask him." (T. 52) As a result, Petitioner did not testify in the hearing on the Motion to Suppress Evidence.

This issue was brought up on appeal to the Supreme Court of Arkansas. However, the Arkansas court, with one dissent, declined to address the merits, saying that an insufficient proffer was made. The dissent by Justice Purtle noted that the ruling was clearly an incorrect statement of the law and expressed the opinion that a sufficient appellate record was made.

A trial court's holding that a defendant, in testifying with regard to a pre-trial evidentiary motion, waives his Fifth Amendment rights, is clearly erroneous. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). A defendant cannot be compelled to waive one right in order to exercise another.

In addition to the constitutional bases for absence of waiver, Rule 104(d) of the Arkansas Uniform Rules of Evidence notes that "an accused does not, by testifying

upon a preliminary matter, subject himself to cross-examination as to other issues in the case." Moreover, a conviction obtained in violation of state procedural rules is, in itself, a violation of a defendant's due process rights guaranteed by the Fifth and Fourteenth Amendments. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Clearly, that is what happened in this case. The Petitioner desired to testify in the motion to suppress and his attorney moved *in limine* to prevent cross-examination as to other issues. The trial court denied his motion with an erroneous statement of law. This violated his rights guaranteed by the Fourth and Fifth Amendments, made applicable to the state by the Fourteenth Amendment.

CONCLUSION

Petitioner therefore respectfully prays that this honorable Court grant this Petition for Writ of Certiorari to the Supreme Court of Arkansas on the matter in issue herein discussed.

Respectfully submitted,

JOHN W. ACHOR
The John Haskins Law Firm
1690 Union National Plaza
Little Rock, AR 72201
501/372-2224

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, John W. Achor, attorney for Petitioner, do hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari to the Honorable Steve Clark, Attorney, General, Justice Building, Little Rock, AR 72201, by depositing the same in the U.S. mail, first class postage prepaid, this 3rd day of June, 1983.

/s/ John W. Achor
JOHN W. ACHOR

APPENDIX A

SUPREME COURT OF ARKANSAS
NO. CR 83-22

Opinion Delivered February 28, 1983.

CHARLES SMITH,

Appellant,

V.

STATE OF ARKANSAS,

Appellee.

Appeal from Van Buren Circuit Court; George F. Hartje, Judge

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. The appellant, charged with possession of seven pounds of marihuana with intent to deliver, was convicted by a jury and sentenced to a six-year prison term and a $1,000 fine. The Court of Appeals transferred the case to us under Rule 29 (4) (b).

While the case was pending in that court, the appellant's attorney filed a brief without a proper abstract of the testimony. When the Attorney General called attention to the deficiencies, the Court of Appeals correctly gave effect to Rule 9 (e) (2) by denying appellant's motion to be allowed to file a *supplemental* abstract and brief, but permitting counsel to file a *substituted* abstract and brief. Counsel, however, disregarded the plain language of both the rule and the order by filing a mere supplemental abstract and brief. The rule does not contemplate that anything less than a complete, substituted abstract and brief may be filed in the circumstances; so we must treat the supplemental abstract and brief as the appellant's only one in the case. When, as here, an appellant's abstract is deficient, our practice is to rely on the record if it shows

that the trial court's decision should be affirmed on a particular point, but not to explore the record for prejudicial error if none is shown by the abstract.

On September 14, 1981, Kirk Hicks was a Van Buren county deputy sheriff and also a police officer employed by the city of Damascus. That night he stopped the appellant's car because it had no taillights. The officer, having some reason to suspect that the appellant or his companion had unlawfully killed a deer, searched the trunk of the car and found not a deer but seven pounds of marihuana. After the trial counsel filed a motion for new trial on the ground that Hicks was not a certified law enforcement officer, so that the arrest and search were illegal. The denial of that motion is the first ground for reversal.

No reversible error is shown. Act 452 of 1975, as amended, provides for the certification of law enforcement officers and recites that official action taken by an uncertified officer is invalid. Ark. Stat. Ann. §42-1007 (Supp. 1981) and §42-1009 (Repl. 1977). Section 42-1007 also provides, however, that full-time officers serving on the effective date of the act may continue in their employment. Officer Hicks had been a police officer for some years before the passage of the 1975 act and was therefore exempted by its "grandfather clause." It is not clear that he lost his status by moving from Stone county to Damascus and continuing in police work there. *See* §42-1007. In any event, all the facts were available to counsel before the trial; so the motion for new trial was not supported by the necessary showing of diligence. *Newberry v. State*, 262 Ark. 334, 557 S.W.2d 864 (1977).

A second argument is that the trial judge should not have answered the jury's inquiry, during their deliberations, about parole eligibility for a person sentenced to one year in jail. Defense counsel, however, agreed in response to a question by the trial judge that information about "the parole situation" could be given to the jury. That

distinguishes this case from our holding in *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971), for counsel cannot consent that the trial judge take some action and then seek a reversal on the basis of that action. *Clark v. State*, 213 Ark. 652, 212 S.W.2d 20 (1948).

A third argument is that the appellant did not voluntarily consent to the search of the trunk of his car. The substituted abstract of the testimony at the suppression hearing does not show that the consent was not voluntary. It is also argued that the trial judge was wrong in ruling that if the defendant took the witness stand at the suppression hearing he could not limit his testimony to the issue of whether or not his consent was given. Even so, there was no proffer of what the defendant's testimony would have been; so we have no way of knowing whether he would have testified to facts rebutting his asserted consent to the search. *Barnes v. Young*, 238 Ark. 484, 382 S.W.2d 580 (1964).

Affirmed.

Purtle, J., dissents.

APPENDIX B

SUPREME COURT OF ARKANSAS
NO. CR 83-22

Opinion Delivered February 28, 1983.

CHARLES SMITH,

Appellant,

V.

STATE OF ARKANSAS,

Appellee.

Appeal from Van Buren Circuit Court; George F. Hartje, Judge

Dissent

JOHN I. PURTLE, Associate Justice

I disagree for two reasons. First, it was reversable error for the trial court to rule that if appellant took the stand at the Denno hearing he had no right to refuse to testify on any matter the state chose to inquire about. Second, it was prejudicial error to allow the jury to receive evidence of parole eligibility, which in all probability was wrong anyway.

The Denno hearing was conducted to determine whether appellant had given a valid consent to the search of the trunk of his automobile. The officer was told by appellant that he did not want his vehicle searched. No doubt the presence of the purported deputy sheriff with his pistol at his side influenced appellant to change his mind and consent to the search. I am not so naive as to believe the appellant simply changed his mind and agreed to incriminate himself for the convenience of the purported officer. Consent to an invasion of privacy must be proven by clear and positive testimony and this burden is not met by showing acquiescence. *Meadows v. State*, 269 Ark. 380, 602 S.W.2d

636 (1980). *Rodriquez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978). Had the trial court not ruled the appellant could not testify without waiving his immunity the preponderance of the testimony would have, no doubt, revealed that the state did not meet the burden required to validate an otherwise illegal search. The court stated at the Denno hearing: " . . . once he takes the stand, he does not have the right to not answer . . . if you put him on, the state can ask him whatever they want to ask him." This is plainly a misstatement of the law. I further think that the acting deputy sheriff had no idea what was in the trunk of this vehicle but merely wanted to look around to see what he could find, as is the case so often when officers are permitted to make seizures without probable cause, or warrant, as required under the Fourth Amendment.

Next, even if appellant's attorney agreed to the court's improper comment on the parole system it was the duty of the court not to do so. The matter never should have reached the point where appellant's counsel consented to it. In *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971) we had before us a case where the court made a similar improper statement to the jury and there we stated:

> Accordingly, we have concluded that this information should not be given the jury, and when asked for such information, the court should reply, in effect, that it is improper for the court to answer the inquiry and an answer might well constitute reversible error; that the jury need not concern itself with the matter; that the control of the parole system is committed by law to the legislative and executive branches of the government, and, that the jury, if reaching a verdict of guilty, has only the duty of imposing such punishment as may be considered, under the court's previous instructions, to be appropriate.

It is likely that the statement to the jury was incorrect anyway as to the amount of time the appellant would have to serve before becoming eligible for parole. Any

explanation of the parole system to a jury is improper, but incorrect information compounds the error. Therefore, I would reverse and remand for a new trial after the evidence obtained by the illegal search is suppressed. Affirmed.

APPENDIX C

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

April 4, 1983

John W. Achor
Attorney at Law
1690 Union National Plaza
Little Rock, AR 72201

Re: CR 83-22 Charles Smith v. State of Arkansas

Dear Mr. Achor:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams, Clerk

DLW:rh

cc: Victra L. Fewell
Sammy Collums

NO. 82-1984

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1982

CHARLES SMITH PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General

By: VICTRA L. FEWELL
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT

NO. 82-1984

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1982

CHARLES SMITH PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF ARKANSAS

BRIEF OF RESPONDENT
IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds, at the Court's request, to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant's Fourth and Fifth Amendment rights are violated by a State trial court's holding that if he chooses to testify in a pretrial suppression hearing, he is open to cross-examination on matters other than his

consent to search?

2. Whether this issue is barred by Wainwright v. Sykes, 433 U.S. 72 (1977), for failure to comply with State procedural rules in raising the issue to the State trial and appellate courts?

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OPINION BELOW

This case is reported Smith v. State, 278 Ark. 462, 648 S.W.2d 792, reh. denied, No. CR 83-22 (Ark. April 4, 1983).

JURISDICTION

The petitioner has adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional provisions involved. Copies of the relevant Arkansas rules of procedure are set out in respondent's appendix.

STATEMENT OF THE CASE

The petitioner has adequately set forth the facts of the case.

REASONS FOR DENYING THE WRIT

I. PETITIONER VIOLATED A NUMBER OF STATE PROCEDURAL RULES AT TRIAL AND ON APPEAL, AND THIS ISSUE WAS NEVER PROPERLY PRESENTED TO THE STATE COURTS.

It is imperative that the Court understand the procedural history of this case in order to get into perspective the issue raised in the petition. The petition does not make it clear that petitioner repeatedly failed to follow Arkansas procedural rules for raising this issue and that it is therefore barred pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977).

The Fourth Amendment issue at trial was the search of petitioner's car and his consent thereto. The following transpired at a suppression hearing on the issue after the police officer making the search testified that petitioner voluntarily opened his car trunk at the officer's request:

MR. WALLOCH (DEFENSE COUNSEL): Your

Honor, I'd like to call the defendant, Mr. Smith, for the purpose of this hearing, just strictly for the purpose of whether or not consent was given to a search of the vehicle.

THE COURT: I understand the defendant has a right not to testify. I understand that he has no right to limit his testimony once he takes the witness stand.

MR. WALLOCH: In other words, if the purpose of this hearing is for the exclusion of evidence and whether or not there was consent to the search, you would not be willing to limit the testimony to that?

THE COURT: Well, I don't know that I have any great say in the matter. Is not what I told you the law, what I just said there? Is that not the law? A witness has a right to plead the fifth and refuse to answer specific questions; a defendant has the right not to take the witness stand. But once he takes the witness stand, he does not have the right to not answer the questions he does not want to answer. Now, I feel like if you put him on, the state can ask him whatever they want to ask him.

MR. WALLOCH: Your Honor, the defendant, Mr. Smith, elects not to take the stand at this time.

THE COURT: I would deny the motion to suppress. (T.53)

Petitioner renewed his motion to suppress when the sheriff identified the two (2) bags of marijuana at trial. The trial court asked if petitioner had anything new to offer on the motion, and when defense counsel indicated that he did not, the court again denied the motion. (T.83)

Petitioner filed two motions for new trial, one alleging that the trial court improperly instructed the jury on the possibility of parole and the other regarding the certification of the officer who arrested him. (T.18, 21) A hearing was held on the latter motion, which was ultimately denied. (Both issues were reached by the Arkansas Supreme Court on appeal. Although it reached the merits on the certification issue, it also found both issues barred under procedural rules. Smith v. State, 278 Ark. 462, 464-65, 648 S.W.2d 792, reh.

denied, No. CR 83-22 (Ark. April 4, 1983)).

This issue was further confused because of the way in which it was presented to the Arkansas Supreme Court on appeal. As the opinion states, petitioner originally filed a brief with an insufficient abstract, a procedural bar argued by the State in its responsive brief. The Arkansas Supreme Court will not consider issues which are not fully abstracted. Kitchen v. State, 271 Ark. 1, 17, 607 S.W.2d 345 (1980). The Arkansas Court of Appeals, to which the case was originally assigned, permitted petitioner to file a substituted brief to correct the deficiencies in his abstract. Petitioner instead filed a supplemental brief and abstract, which did not contain the material in the first brief. When the case was transferred to the Arkansas Supreme Court,

it held that it would have to treat the supplemental brief and abstract as the only one filed. Smith v. State, 278 Ark. at 463-64.

It should also be noted that the argument made on appeal was strictly a Fourth Amendment, consent-to-search issue. The argument made here was not raised until the supplemental brief, after the State had pointed out that the State's evidence of consent had been unrebutted at the suppression hearing. It was offered as an excuse for not rebutting the State's evidence, not for the substantive purpose for which it is raised here. In short, petitioner did not raise this issue squarely or properly to the Arkansas Supreme Court. It is clear from the court's opinion that it was addressing only the consent issue, finding that petitioner had not properly proffered what his alleged testimony would have been.

The first reason this issue is procedurally barred is for petitioner's failure to object at trial to the trial court's ruling. Failure to timely object amounts to an independent and adequate State procedural ground to prevent direct review by this Court. Henry v. Mississippi, 379 U.S. 443 (1965). While Henry required a showing of deliberate bypass pursuant to Fay v. Noia, 372 U.S. 391 (1963), this Court subsequently modified that holding to establish the contemporaneous objection rule of Wainwright v. Sykes, 433 U.S. 72 (1977), requiring a showing of cause and prejudice to obviate a validly applied State procedural waiver. See also Engle v. Isaac, 456 U.S. 107 (1982).

It is clearly the rule in Arkansas that an objection must be made to any ruling of the trial court if the defendant wishes to preserve the error for

appeal. Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980). See also Ark. Uniform R. Evid., 103(a)(1), Ark. Stat. Ann. §28-1001 (Repl. 1979). There was no such objection made on this issue at trial.

It appears that both defense counsel and the trial court were somewhat in error about the scope of cross-examination at a suppression hearing. While a defendant receives some protection under Ark. Uniform R. Evid. 104(d), Ark. Stat. Ann. §28-1001 (Repl. 1979), the State would have received the benefit of Rule 104(e), providing that Rule 104 does not limit the right of a party to introduce evidence going to credibility. The Arkansas Supreme Court, in Carroll & Cox v. State, 276 Ark. 160, 164, 634 S.W.2d 99 (1982), addressed an issue in which a defendant alleged that the prosecutor was allowed to go too far afield in his

cross-examination at a suppression hearing, although defense counsel had objected to numerous questions as not relevant to suppression. The Arkansas Supreme Court held that the credibility of the defendant was pertinent, i.e., relevant, and that the trial court did not err in allowing the prosecutor to pursue those lines of questioning. The court also noted that the defendant had not pointed out "even one solitary fact that was improperly brought out by the cross-examination" and had therefore failed to show prejudice.

Petitioner apparently wished to limit his testimony only to the issue of consent. It is obvious that the prosecutor could have inquired into other relevant issues pertaining to the search. Under Carroll, the prosecutor could also have asked questions designed

to reveal petitioner's lack of credibility. In ruling that petitioner could not limit his testimony solely to the issue of consent, the trial court ruled correctly. He may have erred had he actually allowed the prosecutor to ask petitioner anything and everything about which he was curious. However, the Court cannot presume from this record that that is in fact what would have occurred.

When the trial court indicated that it would not limit the scope of cross-examination of appellant at the suppression hearing, defense counsel should have made a proffer of petitioner's testimony pursuant to Ark. Uniform R. Evid. 103(2). Another alternative would have been to put petitioner on the stand and either have him invoke his Fifth Amendment right or have counsel offer an objection if the prosecutor exceeded the permissible scope

of cross-examination.

The trial court indicated that petitioner had the right to take the Fifth Amendment and refuse to answer specific questions. If petitioner's testimony were critical to the suppression, he should have pursued the matter a little further. At the very least, he could have cited to the trial court the authority on which he later attempted to rely.

As it was, counsel merely acquiesced in the trial court's threshold ruling without objection and indicated that petitioner elected not to take the stand.

In his first brief on appeal petitioner merely alleged the lack of consent to search. The State argued that his failure to abstract relevant parts of the record precluded consideration of the issue. Further, appellant's argument was based on what transpired at

trial, not on the testimony at the suppression hearing, at which he presented no witnesses. The State noted that the trial court's ruling was properly based on the testimony adduced at the suppression hearing. A co-defendant testified at trial, giving some minimal support to the lack-of-consent argument. On an analogous issue, the Arkansas Supreme Court has held that, when a Denno hearing is held on the admissibility of a confession, it will not consider on appeal allegations about later trial testimony unless that testimony is raised by the defendant to the trial court. Titus v. State, 268 Ark. 9, 15-16, 593 S.W.2d 164 (1980). In short, the minimal support given by the co-defendant could not be raised on appeal because its alleged significance had not been pointed out to the trial court. Further, the incriminating evidence had already been intro-

duced at trial before the co-defendant testified. Petitioner did not move to strike the evidence, renew his motion to suppress or take any action to indicate to the trial court that the co-defendant's testimony might cast a different light on the consent issue.

After the State made all these arguments, petitioner filed his supplemental brief raising the issue now before this Court. Again, he did not raise it for the substance of the issue but to attempt to show that his testimony about consent was improperly precluded at the suppression hearing by the trial court's ruling. It is clear from the Arkansas Supreme Court's opinion that the supplemental abstract was also deficient. Smith v. State, 278 Ark. at 464.

In deciding the issue, the Arkansas Supreme Court did not rely on the initial failure to object. It relied instead on

the rule that a party who wishes to preserve error on a ruling admitting or excluding evidence must proffer the substance of the evidence or testimony. Smith v. State, 278 Ark. at 465, citing Barnes v. Young, 238 Ark. 484, 382 S.W.2d 580 (1964). See also Ark. Uniform R. Evid. 103(2).

It was a combination of petitioner's failure to abstract and brief the issue properly on appeal, as well as a failure to proffer the alleged testimony, that precluded the Arkansas Supreme Court from reaching either the consent issue or the Fifth Amendment issues on their merits.

In short, there were numerous avenues open to appellant, not the least of which was an objection. Since he did not object to the ruling or attempt to proffer his testimony, he has made no showing of prejudice, and the Arkansas Supreme Court properly refused to reverse his convic-

tion on these issues.

Appellant cites in support of his basic argument only one case, Simmons v. United States, 390 U.S. 377 (1968), which is not on point here. That case involved a narrow holding that, when a defendant testified in a suppression hearing to establish standing to assert a Fourth Amendment right, that testimony may not later be introduced at trial in violation of Fifth Amendment rights. Even that holding, which is not relevant here, may be limited by later cases. See United States v. Salvucci, 448 U.S. 83, 94 (1980), in which the Court held that the "protective shield of Simmons is not to be converted into a license for false representations"; and McGautha v. California, 402 U.S. 183, 212-13 (1971):

> While we have no occasion to question the soundness of the result in Simmons and do not do so, to the extent that its rationale was based on a "tension"

> between constitutional rights and the policies behind them the validity of that reasoning must now be regarded as open to question, and it certainly cannot be given the broad thrust which is attributed to it by (the defendant) in the present case.

See generally 1 Weinstein's Evidence §104 (10) (1981 & Supp. 1981).

Perhaps as a last ditch effort, petitioner misapplies Hicks v. Oklahoma, 447 U.S. 343 (1980), in alleging that a conviction obtained in violation of a state procedural rule is a violation of a defendant's due process rights. In Hicks, the defendant was improperly sentenced under an habitual offender statute which had been held unconstitutional. This Court held that the State court could not speculate that a jury might have sentenced him to the same term of years under a subsequent statute, since that deprived the defendant of the right to be sentenced by a jury.

It is well established that a State's

violation of one of its own procedural rules or laws does not necessarily rise to the magnitude of a due process violation. Barclay v. Florida, No. 81-6908 (U.S. July 6, 1983), slip op. at 17, citing Gryger v. Burke, 334 U.S. 728, 731 (1948). See also Engle v. Isaac, 456 U.S. at 121 n. 21.

As respondent has already noted, the trial court apparently misunderstood the scope of cross-examination at a suppression hearing. On its face, his ruling was erroneous. However, that does not excuse counsel from presenting the proper authority to the trial court and supporting his motion with sound legal argument. He cited absolutely no authority to the trial court, either federal constitutional law or the applicable State rule of evidence. It is clear that petitioner's testimony could not have been limited only to the narrow

issue of consent, so the motion was not even based on sound legal principle. It was downhill from there, as petitioner repeatedly neglected to observe State procedural rules for the preservation and presentation of issues, both to the trial court and the Arkansas Supreme Court.

Petitioner has not alleged any "cause" for his failure to observe numerous State procedural rules. It is clear that the Arkansas Supreme Court invoked at least two of those available. It is also only speculative that there could have been any prejudice. That could only have occurred if petitioner could, as a matter of law, have established through his testimony that he did not consent to the search of his car trunk. There is some question that prejudice would inure even then in light of this Court's recent decisions in Michigan v. Thomas, 73 L.Ed.2d

750 (1982), and United States v. Ross, 456 U.S. 798, 811-24 (1982). The officer who arrested petitioner testified that he stopped the automobile with no tail-lights and noticed that petitioner had blood on his leg and that there was blood on the hood of the car. The officer apparently suspected a hunting violation, because he asked petitioner and his passenger if they had been squirrel hunting or if they had killed a deer. The men denied hunting but would not tell the officer where the blood came from. When the officer asked if they would care to show him the contents of the trunk, petitioner got out of the car and opened the trunk. It contained two guns, a shotgun and a rifle. It also contained two plastic garbage bags, one of which was torn open. The officer quickly ascertained that the open bag contained marijuana. This sequence

of events indicates that the officer could have searched the trunk even without consent, since he had probable cause to believe that the car contained evidence of either a hunting violation or perhaps even of murder.

In view of the confusing procedural history of this case, and the numerous waiver issues, it should seem an unlikely case for this Court to take on certiorari. If there is merit to the issues, which respondent does not concede, it would seem to be better determined on a petition for writ of habeas corpus and after the federal District Court determines if an evidentiary hearing is warranted on the allegations.

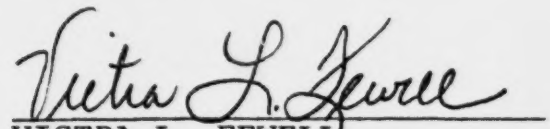
CONCLUSION

Petitioner arrives at this Court's door with an issue hopelessly intertwined with numerous violations of State procedural rules, both at trial and on appeal.

It appears that almost nothing was done to properly preserve the issue, which was never raised to the trial court and was only raised obliquely with improper briefing and abstracting to the Arkansas Supreme Court. Petitioner has alleged no "cause" for his failure to adhere to any of the procedural rules, and his chances of showing prejudice are highly speculative, at best. This is simply not a case worthy of this Court's consideration on certiorari from direct appeal.

Respectfully submitted,

STEVE CLARK
Attorney General

By: 

VICTRA L. FEWELL
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Victra L. Fewell, Assistant Attorney General, do hereby certify that three copies of the foregoing Response to Petition for Writ of Certiorari to the Arkansas Supreme Court has been served on petitioner herein by mailing a copy of same, postage prepaid, to John W. Achor, Attorney at Law, Haskins & Wilson, 1690 Union National Plaza, Little Rock, Arkansas, 72201, this 23rd day of September, 1983.

Victra L. Fewell

VICTRA L. FEWELL
Assistant Attorney General

ARKANSAS UNIFORM RULES OF EVIDENCE
Ark. Stat. Ann. §28-1001
(Repl. 1979)

Rule 103. Rulings on evidence.--(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The Court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Errors Affecting Substantial Rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104. Preliminary questions.--(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases, shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if he so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examina-

tion as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.